



General Assembly

February Session, 2000

Raised Bill No. 5612

LCO No. 1401

Referred to Committee on Judiciary

Introduced by:
(JUD)

***An Act Concerning Standards Of Conduct And Liability For
Corporate Directors And Officers.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 33-756 of the general statutes is repealed and the
2 following is substituted in lieu thereof:

3 (a) [A director shall discharge his duties as a director, including his
4 duties as a member of a committee] Each member of the board of
5 directors, when discharging the duties of a director, shall act: (1) In
6 good faith; [(2) with the care an ordinarily prudent person in a like
7 position would exercise under similar circumstances; and (3)] and (2)
8 in a manner [he] the director reasonably believes to be in the best
9 interests of the corporation.

10 (b) The members of the board of directors or a committee of the
11 board, when becoming informed in connection with their decision-
12 making function or devoting attention to their oversight function, shall
13 discharge their duties with the care that a person in a like position
14 would reasonably believe appropriate under similar circumstances.

15 (c) In discharging board or committee duties, a director, who does
16 not have knowledge that makes reliance unwarranted, is entitled to
17 rely on the performance by any of the persons specified in subdivision
18 (1) or (3) of subsection (e) of this section to whom the board may have
19 delegated, formally or informally by course of conduct, the authority
20 or duty to perform one or more of the board's functions that are
21 delegable under applicable law.

22 [(b)] (d) In discharging [his] board or committee duties a director,
23 who does not have knowledge that makes reliance unwarranted, is
24 entitled to rely on information, opinions, reports or statements,
25 including financial statements and other financial data, [if] prepared or
26 presented by [: (1) One or more officers or employees of the
27 corporation whom the director reasonably believes to be reliable and
28 competent in the matters presented; (2) legal counsel, public
29 accountants or other persons as to matters the director reasonably
30 believes are within the person's professional or expert competence; or
31 (3) a committee of the board of directors of which he is not a member if
32 the director reasonably believes the committee merits confidence] any
33 of the persons specified in subsection (e) of this section.

34 (e) A director is entitled to rely, in accordance with subsection (c) or
35 (d) of this section, on: (1) One or more officers or employees of the
36 corporation whom the director reasonably believes to be reliable and
37 competent in the functions performed or the information, opinions,
38 reports or statements provided; (2) legal counsel, public accountants or
39 other persons retained by the corporation as to matters involving skills
40 or expertise the director reasonably believes are matters (A) within the
41 particular person's professional or expert competence, or (B) as to
42 which the particular person merits confidence; or (3) a committee of
43 the board of directors of which the director is not a member if the
44 director reasonably believes the committee merits confidence.

45 [(c) A director is not acting in good faith if he has knowledge
46 concerning the matter in question that makes reliance otherwise

47 permitted by subsection (b) of this section unwarranted.]

48 [(d)] (f) For purposes of sections 33-817, 33-830, 33-831, 33-841 and
 49 33-844, a director of a corporation which has a class of voting stock
 50 registered pursuant to Section 12 of the Securities Exchange Act of
 51 1934, as the same has been or hereafter may be amended from time to
 52 time, in addition to complying with the provisions of subsections (a) to
 53 (c), inclusive, of this section, shall consider, in determining what [he]
 54 the director reasonably believes to be in the best interests of the
 55 corporation, (1) the long-term as well as the short-term interests of the
 56 corporation, (2) the interests of the shareholders, long-term as well as
 57 short-term, including the possibility that those interests may be best
 58 served by the continued independence of the corporation, (3) the
 59 interests of the corporation's employees, customers, creditors and
 60 suppliers, and (4) community and societal considerations including
 61 those of any community in which any office or other facility of the
 62 corporation is located. A director may also in [his] the director's
 63 discretion consider any other factors [he] the director reasonably
 64 considers appropriate in determining what [he] the director reasonably
 65 believes to be in the best interests of the corporation.

66 [(e) A director is not liable for any action taken as a director, or any
 67 failure to take any action, if he performed the duties of his office in
 68 compliance with this section.]

69 Sec. 2. (NEW) (a) A director shall not be liable to the corporation or
 70 its shareholders for any decision to take or not to take action, or any
 71 failure to take any action, as a director, unless the party asserting
 72 liability in a proceeding establishes that: (1) Any provision in the
 73 certificate of incorporation authorized by subdivision (4) of subsection
 74 (b) of section 33-636 of the general statutes or the protection afforded
 75 by section 33-782 of the general statutes for action taken in compliance
 76 with section 33-783 or 33-784 of the general statutes, to the extent
 77 interposed as a defense in the proceeding by the director, does not
 78 preclude liability; and (2) the challenged conduct consisted or was the

79 result of: (A) Action not in good faith; or (B) a decision (i) which the
80 director did not reasonably believe to be in the best interests of the
81 corporation, or (ii) as to which the director was not informed to an
82 extent the director reasonably believed appropriate in the
83 circumstances; or (C) a lack of objectivity due to the director's familial,
84 financial or business relationship with, or a lack of independence due
85 to the director's domination or control by, another person having a
86 material interest in the challenged conduct (i) which relationship or
87 which domination or control could reasonably be expected to have
88 affected the director's judgment respecting the challenged conduct in a
89 manner adverse to the corporation, and (ii) after a reasonable
90 expectation to such effect has been established, the director shall not
91 have established that the challenged conduct was reasonably believed
92 by the director to be in the best interests of the corporation; or (D) a
93 sustained failure of the director to devote attention to ongoing
94 oversight of the business and affairs of the corporation, or a failure to
95 devote timely attention, by making or causing to be made appropriate
96 inquiry, when particular facts and circumstances of significant concern
97 materialize that would alert a reasonably attentive director to the need
98 therefor; or (E) receipt of a financial benefit to which the director was
99 not entitled or any other breach of the director's duties to deal fairly
100 with the corporation and its shareholders that is actionable under
101 applicable law.

102 (b) The party seeking to hold the director liable: (1) For money
103 damages, shall also have the burden of establishing that (A) harm to
104 the corporation or its shareholders has been suffered, and (B) the harm
105 suffered was proximately caused by the director's challenged conduct;
106 or (2) for other money payment under a legal remedy, such as
107 compensation for the unauthorized use of corporate assets, shall also
108 have whatever burden of persuasion may be called for to establish that
109 the payment sought is appropriate in the circumstances; or (3) for
110 other money payment under an equitable remedy, such as profit
111 recovery by or disgorgement to the corporation, shall also have
112 whatever burden of persuasion may be called for to establish that the

113 equitable remedy sought is appropriate in the circumstances.

114 (c) Nothing contained in this section shall: (1) In any instance where
 115 fairness is at issue, such as consideration of the fairness of a transaction
 116 to the corporation under subdivision (3) of subsection (b) of section 33-
 117 782 of the general statutes, alter the burden of proving the fact or lack
 118 of fairness otherwise applicable, (2) alter the fact or lack of liability of a
 119 director under another section of chapter 601 of the general statutes,
 120 such as the provisions governing the consequences of an unlawful
 121 distribution under section 33-757 of the general statutes, as amended
 122 by this act, or a transactional interest under section 33-782 of the
 123 general statutes, or (3) affect any rights to which the corporation or a
 124 shareholder may be entitled under another statute of this state or the
 125 United States.

126 Sec. 3. Section 33-757 of the general statutes is repealed and the
 127 following is substituted in lieu thereof:

128 (a) A director who votes for or assents to a distribution [made in
 129 violation of section 33-687 or the certificate of incorporation] in excess
 130 of what may be authorized and made pursuant to subsection (a) of
 131 section 33-687 is personally liable to the corporation for the amount of
 132 the distribution that exceeds what could have been distributed without
 133 violating said [section or the certificate of incorporation if it is
 134 established that he did not perform his duties in compliance with
 135 section 33-756. In any proceeding commenced under this section, a
 136 director has all of the defenses ordinarily available to a director]
 137 subsection if the party asserting liability establishes that when taking
 138 the action the director did not comply with section 33-756, as amended
 139 by this act.

140 (b) A director held liable under subsection (a) of this section for an
 141 unlawful distribution is entitled to: [contribution: (1) From] (1)
 142 Contribution from every other director who could be held liable under
 143 subsection (a) of this section for the unlawful distribution; and (2)
 144 recoupment from each shareholder [for] of the pro rata portion of the

145 amount of the unlawful distribution the shareholder accepted knowing
146 the distribution was made in violation of subsection (a) of section
147 33-687. [or the certificate of incorporation.]

148 (c) A proceeding [under this section] to enforce the liability of a
149 director under subsection (a) of this section is barred unless it is
150 commenced within two years after the date on which the effect of the
151 distribution was measured under subsection (e) or (g) of section 33-687
152 or as of which the violation of subsection (a) of section 33-687 occurred
153 as the consequence of disregard of a restriction in the certificate of
154 incorporation. A proceeding to enforce contribution or recoupment
155 under subsection (b) of this section is barred unless it is commenced
156 within one year after the liability of the claimant has been finally
157 adjudicated under subsection (a) of this section.

158 [(d) For purposes of this section, a director shall be deemed to have
159 voted for a distribution if such director was present at the meeting of
160 the board of directors or committee thereof at the time such
161 distribution was authorized and did not vote in dissent therefrom, or if
162 such director consented thereto pursuant to section 33-749.]

163 Sec. 4. Section 33-765 of the general statutes is repealed and the
164 following is substituted in lieu thereof:

165 (a) An officer, [with discretionary authority shall discharge his
166 duties under that authority] when performing in such capacity, shall
167 act: (1) In good faith; (2) with the care [an ordinarily prudent] that a
168 person in a like position would reasonably exercise under similar
169 circumstances; and (3) in a manner [he] the officer reasonably believes
170 to be in the best interests of the corporation.

171 (b) In discharging [his] those duties, an officer, who does not have
172 knowledge that makes reliance unwarranted, is entitled to rely on: (1)
173 The performance of properly delegated responsibilities by one or more
174 employees of the corporation whom the officer reasonably believes to
175 be reliable and competent in performing the responsibilities delegated;

176 or (2) information, opinions, reports or statements, including financial
 177 statements and other financial data, [if] prepared or presented by [: (1)
 178 One] one or more officers or employees of the corporation whom the
 179 officer reasonably believes to be reliable and competent in the matters
 180 presented [; or (2)] or by legal counsel, public accountants or other
 181 persons retained by the corporation as to matters involving skills or
 182 expertise the officer reasonably believes are matters (A) within the
 183 particular person's professional or expert competence, or (B) as to
 184 which the particular person merits confidence.

185 [(c) An officer is not acting in good faith if he has knowledge
 186 concerning the matter in question that makes reliance otherwise
 187 permitted by subsection (b) of this section unwarranted.]

188 [(d)] (c) An officer [is not liable for any action taken as an officer, or
 189 any failure to take any action, if he performed the duties of his office in
 190 compliance with this section] shall not be liable to the corporation or
 191 its shareholders for any decision to take or not to take action, or any
 192 failure to take any action, as an officer, if the duties of the office are
 193 performed in compliance with this section. Whether an officer who
 194 does not comply with this section shall have liability will depend in
 195 such instance on applicable law, including those principles of section
 196 33-756, as amended by this act, that have relevance.

197 Sec. 5. Section 33-1104 of the general statutes is repealed and the
 198 following is substituted in lieu thereof:

199 (a) [A director shall discharge his duties as a director, including his
 200 duties as a member of a committee] Each member of the board of
 201 directors, when discharging the duties of a director, shall act: (1) In
 202 good faith; [(2) with the care an ordinarily prudent person in a like
 203 position would exercise under similar circumstances; and (3)] and (2)
 204 in a manner [he] the director reasonably believes to be in the best
 205 interests of the corporation.

206 (b) The members of the board of directors or a committee of the

207 board, when becoming informed in connection with their decision-
208 making function or devoting attention to their oversight function, shall
209 discharge their duties with the care that a person in a like position
210 would reasonably believe appropriate under similar circumstances.

211 (c) In discharging board or committee duties, a director, who does
212 not have knowledge that makes reliance unwarranted, is entitled to
213 rely on the performance by any of the persons specified in subdivision
214 (1) or (3) of subsection (e) of this section to whom the board may have
215 delegated, formally or informally by course of conduct, the authority
216 or duty to perform one or more of the board's functions that are
217 delegable under applicable law.

218 [(b)] (d) In discharging [his] board or committee duties, a director
219 who does not have knowledge that makes reliance unwarranted, is
220 entitled to rely on information, opinions, reports or statements,
221 including financial statements and other financial data, [if] prepared or
222 presented by [: (1) One or more officers or employees of the
223 corporation whom the director reasonably believes to be reliable and
224 competent in the matters presented; (2) legal counsel, public
225 accountants or other persons as to matters the director reasonably
226 believes are within the person's professional or expert competence; or
227 (3) a committee of the board of directors of which he is not a member if
228 the director reasonably believes the committee merits confidence] any
229 of the persons specified in subsection (e) of this section.

230 (e) A director is entitled to rely, in accordance with subsection (c) or
231 (d) of this section, on: (1) One or more officers or employees of the
232 corporation whom the director reasonably believes to be reliable and
233 competent in the functions performed or the information, opinions,
234 reports or statements provided; (2) legal counsel, public accountants or
235 other persons retained by the corporation as to matters involving skills
236 or expertise the director reasonably believes are matters (A) within the
237 particular person's professional or expert competence, or (B) as to
238 which the particular person merits confidence; or (3) a committee of

239 the board of directors of which the director is not a member if the
240 director reasonably believes the committee merits confidence.

241 [(c) A director is not acting in good faith if he has knowledge
242 concerning the matter in question that makes reliance otherwise
243 permitted by subsection (b) of this section unwarranted.

244 (d) A director is not liable for any action taken as a director, or any
245 failure to take any action, if he performed the duties of his office in
246 compliance with this section.]

247 Sec. 6. (NEW) (a) A director shall not be liable to the corporation or
248 its members for any decision to take or not to take action, or any failure
249 to take any action, as a director, unless the party asserting liability in a
250 proceeding establishes that: (1) Any provision in the certificate of
251 incorporation authorized by subdivision (4) of subsection (b) of section
252 33-1026 of the general statutes or the protection afforded by section 33-
253 1128 of the general statutes for action taken in compliance with section
254 33-1129 or 33-1130 of the general statutes, to the extent interposed as a
255 defense in the proceeding by the director, does not preclude liability;
256 and (2) the challenged conduct consisted or was the result of: (A)
257 Action not in good faith; or (B) a decision (i) which the director did not
258 reasonably believe to be in the best interests of the corporation, or (ii)
259 as to which the director was not informed to an extent the director
260 reasonably believed appropriate in the circumstances; or (C) a lack of
261 objectivity due to the director's familial, financial or business
262 relationship with, or a lack of independence due to the director's
263 domination or control by, another person having a material interest in
264 the challenged conduct (i) which relationship or which domination or
265 control could reasonably be expected to have affected the director's
266 judgment respecting the challenged conduct in a manner adverse to
267 the corporation, and (ii) after a reasonable expectation to such effect
268 has been established, the director shall not have established that the
269 challenged conduct was reasonably believed by the director to be in
270 the best interests of the corporation; or (D) a sustained failure of the

271 director to devote attention to ongoing oversight of the business and
272 affairs of the corporation, or a failure to devote timely attention, by
273 making or causing to be made appropriate inquiry, when particular
274 facts and circumstances of significant concern materialize that would
275 alert a reasonably attentive director to the need therefor; or (E) receipt
276 of a financial benefit to which the director was not entitled or any other
277 breach of the director's duties to deal fairly with the corporation and
278 its members that is actionable under applicable law.

279 (b) The party seeking to hold the director liable: (1) For money
280 damages, shall also have the burden of establishing that (A) harm to
281 the corporation or its members has been suffered, and (B) the harm
282 suffered was proximately caused by the director's challenged conduct;
283 or (2) for other money payment under a legal remedy, such as
284 compensation for the unauthorized use of corporate assets, shall also
285 have whatever burden of persuasion may be called for to establish that
286 the payment sought is appropriate in the circumstances; or (3) for
287 other money payment under an equitable remedy, such as profit
288 recovery by or disgorgement to the corporation, shall also have
289 whatever burden of persuasion may be called for to establish that the
290 equitable remedy sought is appropriate in the circumstances.

291 (c) Nothing contained in this section shall: (1) In any instance where
292 fairness is at issue, such as consideration of the fairness of a transaction
293 to the corporation under subdivision (3) of subsection (b) of section 33-
294 1128 of the general statutes, alter the burden of proving the fact or lack
295 of fairness otherwise applicable, (2) alter the fact or lack of liability of a
296 director under another section of chapter 602 of the general statutes,
297 such as the provisions governing the consequences of an unlawful
298 distribution under section 33-1105 of the general statutes, as amended
299 by this act, or a transactional interest under section 33-1128 of the
300 general statutes, or (3) affect any rights to which the corporation or a
301 member may be entitled under another statute of this state or the
302 United States.

303 Sec. 7. Section 33-1105 of the general statutes is repealed and the
304 following is substituted in lieu thereof:

305 (a) A director who votes for or assents to a distribution [made in
306 violation of] in excess of what may be authorized and made pursuant
307 to sections 33-1000 to 33-1290, inclusive, as amended by this act, or the
308 certificate of incorporation is personally liable to the corporation for
309 the amount of the distribution that exceeds what could have been
310 distributed without violating said sections [or the certificate of
311 incorporation if it is established that he did not perform his duties in
312 compliance with section 33-1104. In any proceeding commenced under
313 this section, a director has all of the defenses ordinarily available to a
314 director] if the party asserting liability establishes that when taking the
315 action the director did not comply with section 33-1104, as amended by
316 this act.

317 (b) A director held liable under subsection (a) of this section for an
318 unlawful distribution is entitled to: [contribution: (1) From] (1)
319 Contribution from every other director who could be held liable under
320 subsection (a) of this section for the unlawful distribution; and (2)
321 recoupment from each recipient [for] of the pro rata portion of the
322 amount of the unlawful distribution the recipient accepted knowing
323 the distribution was made in violation of sections 33-1000 to 33-1290,
324 inclusive, as amended by this act, or the certificate of incorporation.

325 (c) A proceeding [under this section] to enforce the liability of a
326 director under subsection (a) of this section is barred unless it is
327 commenced within three years after the date on which the distribution
328 was made. A proceeding to enforce contribution or recoupment under
329 subsection (b) of this section is barred unless it is commenced within
330 one year after the liability of the claimant has been finally adjudicated
331 under subsection (a) of this section.

332 [(d) For purposes of this section, a director shall be deemed to have
333 voted for a distribution if such director was present at the meeting of
334 the board of directors or committee thereof at the time such

335 distribution was authorized and did not vote in dissent therefrom, or if
336 such director consented thereto pursuant to section 33-1097.]

337 Sec. 8. Section 33-1111 of the general statutes is repealed and the
338 following is substituted in lieu thereof:

339 (a) An officer, [with discretionary authority shall discharge his
340 duties under that authority] when performing in such capacity, shall
341 act: (1) In good faith; (2) with the care [an ordinarily prudent] that a
342 person in a like position would reasonably exercise under similar
343 circumstances; and (3) in a manner [he] the officer reasonably believes
344 to be in the best interests of the corporation.

345 (b) In discharging [his] those duties an officer, who does not have
346 knowledge that makes reliance unwarranted, is entitled to rely on: (1)
347 The performance of properly delegated responsibilities by one or more
348 employees of the corporation whom the officer reasonably believes to
349 be reliable and competent in performing the responsibilities delegated;
350 or (2) information, opinions, reports or statements, including financial
351 statements and other financial data, [if] prepared or presented by [: (1)
352 One] one or more officers or employees of the corporation whom the
353 officer reasonably believes to be reliable and competent in the matters
354 presented [; or (2)] or by legal counsel, public accountants or other
355 persons retained by the corporation as to matters involving skills or
356 expertise the officer reasonably believes are matters (A) within the
357 particular person's professional or expert competence, or (B) as to
358 which the particular person merits confidence.

359 [(c) An officer is not acting in good faith if he has knowledge
360 concerning the matter in question that makes reliance otherwise
361 permitted by subsection (b) of this section unwarranted.]

362 [(d)] (c) An officer [is not liable for any action taken as an officer, or
363 any failure to take any action, if he performed the duties of his office in
364 compliance with this section] shall not be liable to the corporation or
365 its members for any decision to take or not to take action, or any failure

366 to take any action, as an officer, if the duties of the office are performed
367 in compliance with this section. Whether an officer who does not
368 comply with this section shall have liability will depend in such
369 instance on applicable law, including those principles of section 33-
370 1104, as amended by this act, that have relevance.

371 Sec. 9. This act shall take effect from its passage.

Statement of Purpose:

To revise the standards of care and liability for directors and officers of corporations.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]